

No. 92-97

Supreme Court, U.S.
FILED

AUG 5 1993

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1993

NORTHWEST AIRLINES, INC., SIMMONS AIRLINES, INC.,
COMAIR, INC., MIDWAY AIRLINES (1987), INC.,
USAIR, INC., AMERICAN AIRLINES, INC., and UNITED
AIRLINES, INC.,

Petitioners,

v.

COUNTY OF KENT, MICHIGAN, THE KENT COUNTY BOARD
OF AERONAUTICS, and THE KENT COUNTY DEPARTMENT
OF AERONAUTICS,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

1. Whether the Commerce Clause and the federal aviation laws permit the Nation's airports to assess user fees on airlines and passengers that charge the airlines substantially more than their fair share of the airports' costs, that produce revenues far in excess of those costs, and that deliberately discriminate against airlines in favor of local aviation.

2. Whether the Commerce Clause is automatically rendered inapplicable to an area of commerce whenever the Congress takes any action at all to regulate that area.

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinions of the Court of Appeals (J.A. 15) are reported at 955 F.2d 1054. The opinion of Chief Judge Merritt dissenting from the denial of *en banc* rehearing (Pet. App. 62a) is reported at 955 F.2d 1066. The opinion of the District Court granting judgment to respondents (Pet. App. 23a) is reported at 738 F. Supp. 1112. The opinions of the District Court denying petitioners' motions

for summary judgment and granting partial summary judgment to respondents (Pet. App. 41a, 47a) are unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on February 3, 1992. That court's order denying a timely-filed petition for rehearing and suggestion for rehearing *en banc* was entered on April 16, 1992. This Court has jurisdiction under 28 U.S.C. § 1254(1). The petition for a writ of certiorari was filed on July 13, 1992, and granted on June 7, 1993.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause of the United States Constitution, Art. 1, § 8, cl. 3, provides, in pertinent part, that "The Congress shall have Power . . . to regulate Commerce . . . among the several States"

The Anti-Head Tax Act, 49 U.S.C. App. § 1513, provides, in pertinent part:

(a) *Prohibition; exemption*

No state (or political subdivision thereof . . .) shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom

(b) *Permissible State taxes and fees*

[N]othing in this section shall prohibit a State (or political subdivision thereof . . .) from the levy or collection of taxes other than those enumerated in subsection (a) of this section . . . and nothing in this section shall prohibit a State (or political subdivision thereof . . .) owning or operating an airport from levying or collecting reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities.

Section 2210 of Title 49 App., U.S.C. provides, in pertinent part:

(a) *Sponsorship*

As a condition precedent to approval of an airport development project contained in a project grant application submitted under this chapter, the Secretary shall receive assurances, in writing, satisfactory to the Secretary, that—

(1) the airport to which the project relates will be available for public use on fair and reasonable terms and without unjust discrimination . . . ;

(9) the airport operator or owner will maintain a fee and rental structure for the facilities and services being provided the airport users which will make the airport as self-sustaining as possible . . . ;

(12) all revenues generated by the airport, if it is a public airport . . . will be expended for the capital or operating costs of the airport, the local airport system, or other local facilities which are owned and operated by the owner or operator of the airport and directly and substantially related to the actual air transportation of passengers or property

STATEMENT OF THE CASE

Petitioners ("the Airlines") are commercial passenger air carriers serving the Kent County International Airport, located near Grand Rapids, Michigan.¹ The Airlines brought this action against respondents Kent County, the Kent County Board of Aeronautics, and the Kent County Department of Aeronautics (collectively, "the Airport") asserting that the user fees imposed on them

¹ For petitioners' statements pursuant to Sup. Ct. Rule 29.1, see Petition for a Writ of Certiorari at ii. All parties to the proceeding are listed in the caption.

by the Airport violate the federal Anti-Head Tax Act, 49 U.S.C. App. § 1513, and the Commerce Clause.² The Airlines contended that the Airport's fees are unreasonable under both of those provisions because they extract revenues that are out of all proportion to the Airlines' fair share of the Airport's costs, because they create enormous Airport surpluses far in excess of its costs, and because they deliberately discriminate against the Airlines in favor of local aviation. The Court of Appeals upheld the bulk of the challenged fees and the Airlines now urge this Court to reverse that judgment.

I. THE CHALLENGED FEES

The Kent County International Airport is a public entity owned by Kent County and operated by the Kent County Board of Aeronautics and the Kent County Department of Aeronautics. J.A. 16. The Airport derives much of its revenue from user fees imposed on the entities who use and benefit from the Airport's facilities. However, those fees are not based on a methodology designed to approximate each user's benefits; nor are the fees set at levels intended to make the Airport merely "self-sustaining." See 49 U.S.C. App. § 2210(a)(9) (1988).

Instead, as explained below, the Airport's fee methodology (1) charges the Airlines far more than their fair share of the Airport's costs; (2) imposes fees calculated to earn a substantial surplus greatly in excess of the Airport's costs, including all costs of operation, maintenance, debt service, and other capital expenditures; and (3) discriminates against the Airlines in favor of local aviation. This fee methodology has generated large cash surpluses for the Airport, surpluses which had risen to more than \$9 million by the end of 1989, and which are projected to rise, at a minimum, to over \$19 million by

² The Airlines also challenged the fees under Michigan state law, a challenge that is not before this Court.

the end of this decade. These reserves amount to more than 127% and 268%, respectively, of the Airport's 1989 revenues. See *infra* note 12.

A. The Airport's Fee Methodology

The Kent County International Airport uses a methodology devised by a consultant, James E. Buckley, to determine the fees to be imposed on the Airport's users. See Pl. Ex. 20 (J.A. 223). This "Buckley methodology" first divides the Airport into three general groups of users: (1) the commercial Airlines, (2) general aviation (which consists of corporate and privately-owned aircraft not used for commercial, passenger, cargo, or military service), and (3) the non-aeronautical concessions (which include car rental agencies, the parking lot, restaurants, gift shops, "rent-a-cart" facilities, and other small vendors). J.A. 17.³ The methodology then purports to allocate to each group the Airport's costs of providing benefits to that group.

In allocating costs, however, the Airport's methodology assumes that only the Airlines and general aviation benefit in any way from the costs of the Airport's "air operations," such as runways and landing operations. As a result, the concessions are allocated none of the costs of the air operations,⁴ even though those operations create the concessions' customer flow and are therefore an enormous benefit to them. Indeed, it is undisputed that because the air passengers are in fact the concessions' customers, the concessions would not exist *at all* were it not for the air operations.⁵ The Airport also

³ The parking lot is owned by the Airport itself, a point that is not material for purposes of this brief.

⁴ See Pl. Ex. 6 at 3-4 (J.A. 199-201).

⁵ See, e.g., Trial Testimony of Charles T. Horngren ("Horngren Testimony") at 592 (J.A. 107-08) (Mr. Horngren, an endowed chair

allocated 100% of its crash, fire, and rescue ("CFR") costs to the Airlines, even though general aviation and the concessions also benefited greatly from those operations. Pet. App. 30a.⁶

Having thereby overallocated costs to the Airlines in relation to the concessions, the Airport then completely ignores its own cost allocations when setting fees for all users *except* the Airlines. Pet. App. 27a-28a. Thus, the Airlines are charged user fees based solely on the theoretical costs which the Airport says should be allocated to them. These fees, which amounted to nearly \$2 million in 1988, are then largely passed on to the Airlines' passengers through ticket prices.⁷

By contrast, however, the fees charged the concessions and general aviation bear no relation whatsoever to those users' allocated costs. Thus, the Airport completely ignores the concessions' theoretical allocated costs and instead charges them actual fees that produce revenues for the Airport far exceeding those allocated costs. Pet. App. 29a. For example, the rental car agencies (the largest concessions) are charged 10% of their gross receipts. The result is that although the rental car agencies were theoretically allocated only \$28,000 in costs per year, the fees actually imposed on them generated revenues for the Airport of more than \$675,000—equating to an astounding 2300% "profit" for the Airport over its

professor of accounting at Stanford University, testified as an expert witness for the Airlines); Trial Testimony of Richard K. Dompke ("Dompke Testimony") at 140 (J.A. 66) (Mr. Dompke, a retired consultant, is a cost accounting expert who testified for the Airlines).

⁶ Indeed, "the vast majority of [CFR] runs do not involve air carrier aircraft." Deposition Testimony of Robert M. Ross ("Ross Deposition") at 98 (J.A. 53) (Mr. Ross has been Director of Aeronautics for the Airport since 1963).

⁷ See J.A. 25; Horngren Testimony at 541 (noting relationship between airline fees and ticket prices) (J.A. 99).

theoretical costs. *Id.* Similarly, the Airport allocated to the parking lot only \$688,000 in costs, but generated fee revenues from that concession of approximately \$1,600,000. *Id.*

This enormous disparity between the Airport's theoretical allocation of costs to the concessions and the actual revenues derived from them is easily explained by two facts. First, the theoretical allocations are artificially low because they attribute none of the costs of the air-operations to the concessions. Second, because those operations create the concessions' customer flow, the concessions are willing to pay fees far in excess of those allocated costs in order to obtain access to that flow.

The result of the Airport's fee methodology is to generate huge surpluses because the Airport necessarily recovers its costs several times over—once from the Airlines, who bear virtually all of the air-operations costs, and a second time from the concessions, who pay fees in excess of their allocated costs. And the surpluses are all generated at the expense of the Airlines and their passengers because, as one of the Airport's expert witnesses admitted, the concessions pass their fees to their customers, who are in fact the Airlines' passengers.⁸

The Airport then adds further to its surplus each year by including, in the costs it allocates to the Airlines and other users, a mythical "carrying charge" on all locally-funded capital assets. Specifically, rather than simply allocating depreciation costs over the useful life of such assets, which would recover only the actual cost of the assets by the end of that period, the Airport assumes that

⁸ See Trial Testimony of John F. Brown ("Brown Testimony") at 950 (agreeing that "concession revenue . . . is derived, directly or indirectly, from the airline passengers") (J.A. 172) (Mr. Brown, a private consultant in the field of airport finances and management, testified for the Airport); see also Appellee Airport's Brief 5 (airline passengers "constitute the primary consumers generating the non-aeronautical (concession) revenue . . .").

each asset was purchased with a non-existent 25- or 30-year mortgage. It then charges users a non-existent 8% "interest" rate over that mortgage period (plus a ½% "maintenance" fee).⁹ As the Airlines showed at trial, these carrying charges result in Airport users being charged two to three times the cost of capital assets, with the difference being added to the Airport's growing surpluses. See Dompke Testimony at 194 (J.A. 82).

Based on all the foregoing, the Airport continues, year after year, to accumulate substantial surpluses far in excess of its costs. Even under the lower rates it imposed prior to 1988, the Airport recorded over \$1,900,000 in surplus revenues in 1987, over \$1,600,000 in 1988, and over \$1,700,000 in 1989,¹⁰ resulting in an accumulated cash reserve that exceeded \$9,000,000 by the end of 1989. Pet. App. 30a. And as the Airlines established at trial, this reserve will rise to more than \$19,000,000 by the end of this decade, even accounting for *all* of the Airport's operations, maintenance, debt service, and other capital costs—including *every* conceivable capital project the Airport was able to imagine for the future, the vast majority of which had not received required state and federal approvals.¹¹ These surpluses are substantial given

⁹ See J.A. 29; Pl. Ex. 6, Exs. 5 & 7 thereto (J.A. 212-13, 216-19); Dompke Testimony at 141-47 (J.A. 67-70).

¹⁰ See Pl. Exs. 301 & 355 (J.A. 278, 279).

¹¹ Trial Testimony of Brian Picardat ("Picardat Testimony") at 847-58 (accounting for all contemplated capital expenditures) (J.A. 130-38) (Mr. Picardat is the Director of Finance for the Kent County Aeronautics Board); Trial Testimony of Harold Pederson at 774-77 (J.A. 123-26) (Mr. Pederson is the Deputy Director of the Kent County Aeronautics Board). This figure, moreover, does not account for any additional revenue that might be generated by the new capital expenditures, or for the fact that these new expenditures would be included in the Airport's rate base and thereby charged back to the users. See Picardat Testimony at 855-56 (J.A. 136-37). Nor does it account for possible revenues from "passenger facility charges," see *infra* at 15, a new source of airport funding that had not been approved by Congress by the time of trial.

the Airport's size; the 1989 surpluses, for example, equaled 25% of the Airport's total revenues under pre-1988 rates, and 30% under higher rates that were to become effective in 1988.¹²

Significantly, the Airport had no explanation or plan for these enormous surpluses, which under federal law must be used for airport purposes and must be only in amounts necessary to make the Airport "self-sustaining." See 49 U.S.C. App. § 2210(a)(9), (12) (1988). Indeed, the sole evidence of record on this point is the statement of one of the Airport's witnesses that he did not know what the excess funds could be used for, and the speculation of another that the funds might serve as "a wonderful contingency fee" in case an earthquake were to occur at Grand Rapids.¹³

Finally, as it does with the concessions, the Airport ignores its own cost allocations when setting fees on general aviation. Instead, it charges fees to general aviation that recover only 20% of the costs that the Airport's own methodology indicates should be allocated to that group. J.A. 26.¹⁴ As a result, while the Airport's most

¹² See Pl. Ex. 355 (J.A. 279). The 1989 accumulated surplus and the projected surplus for the end of this decade are more than 127% and 268%, respectively, of the Airport's total 1989 revenues as calculated under the old rates. See *id.* (revenue figures).

¹³ See Picardat Testimony at 858 (J.A. 138); Trial Testimony of Ferdinand K. Levy ("Levy Testimony") at 1003 (referring to San Francisco earthquake of 1989) (J.A. 190) (Mr. Levy, a professor of economics at the Georgia Institute of Technology, testified as an expert witness for the Airport).

¹⁴ This is done by charging locally-based general aviation only a flat fuel flowage fee of 4 cents per gallon, and by charging "itinerant" general aviation (aircraft based elsewhere) a landing fee. Pet. App. 29a. The Airport has characterized the fuel flowage charge as a "landing fee for the local-based aircraft." Trial Testimony of Robert M. Ross ("Ross Testimony") at 739 (J.A. 118). The fuel flowage fee for local aircraft, which was 3 cents per

recent fee study allocated \$650,000 in costs per year to general aviation, the fees actually imposed on that group bring in less than \$125,000 in revenue. Pet. App. 29a.

B. The Parties' Disagreement Over the Methodology

From the late 1960s to December 31, 1986, the Airport and the Airlines periodically negotiated fee agreements. In 1986, however, the Airport generated a new rate study (based on the Buckley methodology) that would have substantially increased the Airlines' rates and fees beginning January 1, 1987. The Airlines objected to the new rates and fees and, when the parties could not reach an agreement on them, the Airport passed an ordinance unilaterally increasing them. See J.A. 17. These new, higher "Ordinance Rates" were scheduled to become effective on April 1, 1988. Accordingly, on that date the Airlines filed the present suit, asserting that both the new Ordinance Rates and the prior rates were unreasonable as a matter of law.

II. STATUTORY BACKGROUND

Due to the importance of air travel to the Nation's economy and the potential threat that local airport fees pose to that travel, both Congress and this Court have established requirements ensuring that such fees are fair and reasonable.

A. Federal Airport Funding

The federal government has long been intimately involved in local airport financing. In 1970, Congress passed the Airport and Airway Development Act ("AADA") to provide federal assistance for state and

gallon in 1963, has remained at 4 cents since 1967, even though Mr. Buckley had recommended a 12% increase in his initial study. During this same period, the Airlines' landing fees increased by 300%. See Ross Testimony at 719 (J.A. 117); Dompke Testimony at 175 (J.A. 80).

local airport development, assistance that has continued ever since.¹⁸ The primary source of that assistance is a federal tax, currently 10%, on all domestic airline tickets. See 26 U.S.C. § 4261 (Supp. 1990). Shortly after enactment of the AADA, the Airport at Grand Rapids obtained a \$6,000,000 grant to finance capital improvements, and has been a steady recipient of federal funds since then. See Ross Testimony at 667-72 (J.A. 112-16).

In return for such federal assistance, however, Congress requires that an airport "will be available for public use on fair and reasonable terms and without unjust discrimination," and "will maintain a fee and rental structure for the facilities and services being provided the airport users which will make the airport as self-sustaining as possible" 49 U.S.C. App. § 2210(a)(1), (9) (1988). Further, recognizing the incentive for localities to use airport fees as a means of funding general public expenditures, Congress has also required that all airport revenues "be expended for the capital or operating costs of the airport, the local airport system, or other local facilities which are owned and operated by the owner or operator of the airport and directly and substantially related to the actual air transportation of passengers or property." *Id.* § 2210(a)(12).

B. The Evansville Decision

This Court, as well, has acted to ensure that local airports not impose unreasonable fees on airport users. In *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.*, 405 U.S. 707 (1972), the Court reviewed Commerce Clause challenges to user fees imposed on passengers by local airports in Indiana and New Hampshire. The Indiana ordinance had imposed a

¹⁸ See AADA of 1970, Pub. L. No. 91-258, 84 Stat. 219 (repealed 1982); Airport Development Acceleration Act of 1973, Pub. L. No. 93-44, 87 Stat. 88; Airport and Airway Improvement Act of 1982 ("AAIA"), Pub. L. No. 97-248, 96 Stat. 671.

one dollar charge on every passenger enplaning a commercial aircraft, and the New Hampshire law had required every regularly-scheduled commercial air carrier to pay either one dollar or fifty cents per passenger, depending on the weight of the aircraft. *Id.* at 709-10. Various airlines challenged these "head taxes" as being an unreasonable burden on interstate commerce and therefore impermissible under the Commerce Clause.

In response, this Court applied a three-part test, based on prior cases, to determine the reasonableness of the challenged fees. First, airport fees must be "based on some fair approximation of use or privilege for use." *Id.* at 716-17. Second, they must not be "discriminatory against interstate commerce." *Id.* at 717. And third, they must not be "excessive in comparison with the governmental benefit conferred." *Id.*

The Court found that the challenged fees satisfied all three tests and so upheld them. First, even though the fees distinguished among certain kinds of users, the Court found them to be a "fair . . . approximation of the use of facilities for whose benefit they are imposed" (*id.*) because the distinctions were shown to be related to differential use of airport facilities. *Id.* at 718-19. Second, the Court found no discrimination against interstate commerce because "both interstate and intrastate flights are subject to the same charges." *Id.* at 717. And third, the Court found that the fees were not "excessive in relation to costs incurred by the taxing authorities" because the revenues generated would not "do more than meet . . . past, as well as current, deficits." *Id.* at 719, 720.

The Court further held that the fees did not conflict with Congress' policy, as expressed in the AADA, that local airports be permitted to "levy charges designed to help defray the costs of airport construction and maintenance" through a fee structure "which will make the airport as self-sustaining as possible" *Id.* at 721

(quoting Section 18(8) of the AADA) (current version at 49 U.S.C. App. § 2210(a)(9)).

C. The Anti-Head Tax Act

Congress, however, disagreed with the result reached in *Evansville* and in 1973 imposed even stricter fee standards on airports in what is commonly referred to as the Anti-Head Tax Act ("AHTA"). See Airport Development Acceleration Act of 1973, Pub. L. No. 93-44, § 7, 87 Stat. 90 (codified as amended at 49 U.S.C. App. § 1513).

The AHTA outlawed all direct or indirect state and local fees on air travel except certain fees specifically exempted from statutory regulation. Specifically, under the AHTA:

(a) No State (or political subdivision thereof . . .) shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom

(b) [N]othing in this section shall prohibit a State (or political subdivision thereof . . .) from the levy or collection of taxes other than those enumerated in subsection (a) of this section . . . and nothing in this section shall prohibit a State (or political subdivision thereof . . .) owning or operating an airport from levying or collecting reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities.

49 U.S.C. App. § 1513(a), (b) (1988).

The legislative history of the AHTA makes its purpose clear. Congress believed that the *Evansville* decision "[did] not provide adequate safeguards to prevent undue or discriminatory taxation," and intended to "ensure that passengers and air carriers will be taxed at a uniform

rate—by the United States—and that local ‘head’ taxes will not be permitted to inhibit the flow of interstate commerce and the growth and development of air transportation.” S. Rep. No. 12, 93d Cong., 1st Sess. [hereinafter “Senate Report”], reprinted in 1973 U.S.C.C.A.N. 1434, 1446, 1435. Congress was furthermore concerned that head tax revenues “would not be earmarked for airport development, but would be used to gain financial windfalls.” *Id.* at 1446. Like this Court in *Evansville*, 405 U.S. at 714-15, Congress also deemed it irrelevant whether the taxes are paid by the passenger or by the airline, noting that “[w]hether the passenger pays the head tax, or whether it is absorbed by the airlines, the end result is to raise the cost of air travel,” because “[i]n the end, a fare increase would have to be implemented.” Senate Report, 1973 U.S.C.C.A.N. at 1451.

Significantly, the AHTA was enacted as part of the Airport Development Acceleration Act of 1973 (“ADAA”), whose other main purpose was to increase the level of federal airport funding derived from the federal ticket tax on passengers. This increased funding on the one hand and the limitations on state taxes on the other were inextricably linked, Congress intending that “the two actions must be viewed together and that neither should stand alone without the other.” *Id.* at 1455. In sum, Congress concluded that local taxes were generally “inimical to the development of a national system funded in large part by uniform Federal taxes” and “never intended that air travelers would be subject to state and local head taxes as well as to national user charges.” *Id.* at 1455, 1450. Rather, in light of the ADAA’s increased federal funding, Congress believed that “state and local head taxes to raise funds for airport development can be precluded, for they should not be necessary.” *Id.* at 1451. In fact, in Congress’ view, “state and local head taxes constitute an inequitable, double burden of taxation of air passengers.” *Id.* at 1450.

In 1990, after the trial in this case, Congress amended § 1513 to permit local airports, with the express approval of the Secretary of Transportation and after consultation with air carriers, to assess “passenger facility charges (PFCs)” of one, two or three dollars per passenger, provided the revenues are earmarked for specific federally-approved capital projects.¹⁶ This legislation confirms Congress’ continuing intention to subject airport user charges to stringent controls to ensure that those charges are reasonable and are imposed and used only for necessary airport improvements.

III. THE COURT CHALLENGES

A. The *Indianapolis* Decision

This case was not the first challenge to the fee methodology at issue, but rather was decided against the backdrop of the decision in *Indianapolis Airport Authority v. American Airlines, Inc.*, 733 F.2d 1262 (7th Cir. 1984). There, the Court of Appeals for the Seventh Circuit confronted a challenge to fees nearly identical to those at issue here, and unanimously invalidated those fees as unreasonable.

The Court did so on the same three grounds now being urged by the Airlines in this case. Judge Posner, writing for himself and Judge Coffey, concluded that the fees at issue were not “reasonable” within the meaning of the AHTA because:

When concession rentals . . . that are more than three times the cost that [the airport] itself allocates to the

¹⁶ See Aviation Safety and Capacity Expansion Act of 1990, Pub. L. No. 101-508, tit. IX, § 9110, 104 Stat. 1388-357 (codified as amended at 49 U.S.C. App. § 1513(e)). In 1982, Congress also amended § 1513 to specify certain taxation practices, not implicated in this case, which Congress found unreasonably burdened or discriminated against interstate commerce. See AAIA, Pub. L. No. 97-248, tit. V, § 532, 96 Stat. 701 (codified at 49 U.S.C. App. § 1513(d)).

concessions are added to the airline user fees . . . the result is an exaction that is wholly disproportionate to the costs to the airport of serving the airlines and their passengers, and is therefore unreasonable . . .

Id. at 1268. The majority also found the airport's fees unreasonable under the AHTA because they discriminated against the airlines in favor of local general aviation. *Id.* at 1271.

Judge Flaum also found the airport's fees unreasonable, but for a different reason.¹⁷ In his view, the fees were unreasonable because they allocated all of the air-operations costs to the airlines and none to the concessions, thereby necessarily overcharging the airlines. As he wrote:

The dependence of the nonaeronautical users on the airlines to produce customers means that those users receive a substantial benefit from the airlines. The costs of producing that benefit, however, are borne entirely by the airlines.

Id. at 1276.

B. The District Court Opinions

In rejecting the *Indianapolis* decision and ultimately upholding the nearly identical fees presented here, the District Court in this case issued three opinions. See Pet. App. 23a-59a. In its first opinion, denying cross-motions for summary judgment, the Court held that the Airport's fees were not *per se* unreasonable because the methodology did not *on its face* require Airport users to pay more than necessary for maintenance and develop-

¹⁷ Judge Flaum declined to address the AHTA issue, holding that the fees were unreasonable under state law, which likewise imposed a "reasonableness" requirement on airport fees. *Id.* at 1274. However, he did not find that the federal reasonableness requirement should be interpreted any differently, preferring not to reach that issue. *Id.* at 1274 n.5.

ment. *Id.* at 57a. The Court, however, left open the possibility that the Airport's fees might be unreasonable as applied in practice.

In its second opinion, the Court held, in accord with every other court that has addressed the issue, that the Airlines have a private right of action to challenge the reasonableness of the Airport's fees under the AHTA. *Id.* at 43a-44a. The Court then granted partial summary judgment to the Airport on the Airlines' Commerce Clause claim, holding that constitutional review was unavailable once Congress had acted under the AHTA. *Id.* at 46a. The Court therefore ordered the parties to proceed to trial on the question of whether the Airport's fees, as applied in practice, are unreasonable under the AHTA.

After a seven-day bench trial, the Court issued its final opinion and order upholding the bulk of the challenged fees. Even though the Court found itself "troubled by such large surpluses generated by the Airport" (*id.* at 39a), the Court upheld all of the Airport's fees, except its overnight parking charges. The Court held that these latter fees were unreasonable because, even under the Airport's own cost allocation system, the Airlines were being charged more than five times the amount of their allocated overnight parking costs. *Id.* at 38a.

In upholding the remainder of the fees, the Court "decline[d] to follow" *Indianapolis* (*id.* at 35a), but also purported to distinguish that decision on the ground that the airport in that case enjoyed a locational monopoly while the Kent County Airport somehow does not. To reach that conclusion, the Court took "judicial notice" of the fact that there are two other airports about an hour from Grand Rapids. *Id.* at 33a. In so holding, however, the Court ignored unrebutted expert trial testimony that the Kent County Airport is in fact a "natural monopoly." Horngren Testimony at 551, 557 (J.A. 104).

C. The Court of Appeals Opinions

The Airlines appealed to the Court of Appeals for the Sixth Circuit which, through three separate opinions, affirmed that judgment in nearly all respects.

Thus, the Court first rejected Judge Posner's holding in *Indianapolis* that airport fees which are out of all proportion to airport costs are necessarily unreasonable under the AHTA. Instead, the panel reasoned that because concession fees "are not within the scope of the AHTA," the Airport's huge surpluses are irrelevant to whether the fees charged to the Airlines are unreasonable. J.A. 23-25. In addition, the Court upheld the Airport's mythical "carrying charges," finding it reasonable for the Airport to earn a "return on its investment" by imposing fees on the Airlines "similar in scope to the interest charged by a financing institution." *Id.* at 29.

The Court also rejected Judge Flaum's view that it is unreasonable for the Airport to allocate none of its air-operations costs to the concessions even though the concessions reap substantial benefits from those operations. *Id.* at 25-26. Yet in doing so, the Court did not even address the misallocation of *air-operations* costs, holding only that the Airlines had not proven that 100% of the *terminal building* common areas had been allocated to the Airlines. *Id.*

Finally, the Court (through Judges Contie and Nelson) held that it was reasonable for the Airport to discriminate against the Airlines in favor of local general aviation. *Id.* at 32-34. Judge Kennedy dissented on this point, as she agreed with the Seventh Circuit in *Indianapolis* that "[t]his is just the sort of discrimination Congress wanted to prevent in the Anti-Head-Tax Act." *Id.* at 27 (quoting *Indianapolis*, 733 F.2d at 1271).

The Court struck down only one portion of the challenged fees: Judges Kennedy and Contie agreed with the Airlines that it was unreasonable under the AHTA

for the Airport to allocate all of its crash, fire, and rescue ("CFR") service costs to the Airlines, as those services also produce a "substantial benefit" to general aviation and the concessions. *Id.* at 27-28. Thus, even though a majority of the panel assessed the reasonableness of the CFR cost allocation according to the benefits *actually received* by the various other Airport users, the panel inexplicably failed to apply that same standard in assessing the Airport's refusal to allocate *any* of the air-operations costs to the concessions.

Having rejected the Airlines' main contentions under the AHTA, the Court then refused even to consider their contentions under the Commerce Clause, holding that such review was no longer available after enactment of the AHTA. *Id.* at 30-31. Specifically, the Court held that the "courts should only undertake a Commerce Clause review of a tax or regulation if Congress ha[s] taken no other action to regulate the area" (*id.*), and finding that the AHTA constituted some "action" in the "area" of airport fees, the Court declined to entertain the Airlines' Commerce Clause challenge.

Following the decision of the Court of Appeals, the Airlines filed a timely petition for a writ of certiorari, questioning the reasonableness of the Airport's fees under both the federal statutes and the Commerce Clause. The Airport filed no cross-petition.¹⁸

¹⁸ Thus, the Airport could have, but did not file a cross-petition challenging the Court of Appeals' holding that the Airport's CFR cost allocation was unreasonable, nor its holding that the Airlines have a private right of action under the AHTA (J.A. 18-19), which was a necessary predicate to its holding on the CFR issue. Accordingly, neither of these issues is before the Court. See *Air Courier Conference of America v. American Postal Workers Union*, 111 S. Ct. 913, 917 & n.3 (1991) (Court would not decide whether statute embodied Congress' intent to allow cause of action, as question "was not raised . . . in [the] petition for writ of certiorari, nor is it encompassed by the questions presented upon which we based our grant of certiorari"); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 119 n.14 (1985) (Court was "without

SUMMARY OF ARGUMENT

In enacting the AHTA, Congress sought to ensure that airports charge only those fees that fairly approximate the benefits received by each airport user, that earn no more than necessary to make the airport "self-sustaining" without generating "financial windfalls," and that do not unjustly discriminate among users. The fees at Grand Rapids are unreasonable on all of these grounds. Those fees are furthermore unreasonable under the standards set forth by this Court in *Evansville*, in that they (1) charge the Airlines substantially more than their fair share of the Airport's costs; (2) generate large profits far in excess of those costs, and (3) intentionally discriminate against the Airlines in favor of local general aviation.

Moreover, even if the fees were to be found reasonable under the AHTA, the Court of Appeals erred in rejecting the Airlines' separate Commerce Clause challenge. This Court has squarely held that Commerce Clause review is available unless Congress has "expressly stated" otherwise with an "unmistakably clear" intent. In enacting the AHTA, Congress expressed no such intent. To the

jurisdiction" to consider issue, because "[a]n argument that would modify the judgment . . . cannot be presented unless a cross-petition has been filed"); *County of Los Angeles v. Davis*, 440 U.S. 625, 630 n.3 (1979) ("[R]espondents did not cross petition for modification of the judgment of the Court of Appeals reversing the District Court The issue . . . , as a consequence, is not properly before us"); *United States v. New York Telephone Co.*, 434 U.S. 159, 166 n.8 (1977) ("the prevailing party may defend a judgment on any ground which the law and the record permit that would not expand the relief it has been granted") (emphasis supplied); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 381 n.4 (1970) ("Since reversal of the Court of Appeals' ruling on this question would not dictate affirmance of that court's judgment . . . but rather elimination of petitioners' rights thereunder, we will not consider the question in these circumstances"); Sup. Ct. Rule 14.1(a) ("Only the questions set forth in the petition, or fairly included therein, will be considered by the Court").

contrary, Congress sought in that statute to set a *stricter* standard for airports than this Court had applied under the Commerce Clause in *Evansville*, not to approve fees that would otherwise violate that Clause. And here, when the operations of the concessions are taken into account under the Commerce Clause, it is clear under *Evansville* that the resulting fees unreasonably burden the Airlines and their passengers. This renders them unconstitutional.

ARGUMENT

I. THE AIRPORT'S FEES VIOLATE THE ANTI-HEAD TAX ACT

Under the AHTA, an airport may not "levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce," except for "reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities." 49 U.S.C. App. § 1513(a), (b) (1988) (emphasis supplied). The AHTA, therefore, prohibits all "unreasonable" user fees on aircraft operators.

Although Congress did not expressly define what it meant by "reasonable" user fees, the AHTA's legislative history demonstrates that Congress intended for the reasonableness standard to be at least as strict (if not stricter) than that applied in *Evansville*. For Congress enacted the AHTA precisely because it believed *Evansville* had permitted airports *too much* discretion to impose charges on airport users. Thus, Congress banned nearly all local airport charges, allowing only for the "continuation" of reasonable user fees on aircraft operators. See Senate Report, 1973 U.S.C.C.A.N. at 1436. At a bare minimum, therefore, Congress intended for those fees to be measured by and to pass the *Evansville* standard that prevailed prior to the AHTA. See, e.g., *Lorillard v. Pons*, 434 U.S. 575, 580 (1978) (when enacting

statutes, unless Congress indicates to the contrary it is presumed to have adopted prior judicial opinions).

The *Evansville* standard, moreover, is a clear, easily-applied test which has long remained the law for measuring the reasonableness of user fees under the Commerce Clause, and is one this Court has extended to other areas as well.¹⁹ It is furthermore the standard that both the Court of Appeals and the Airport have agreed the present airport user fees must meet to be valid under the AHTA.²⁰ Under that standard, to be "reasonable" an airport's user fees (1) must be "based on some fair approximation of use or privilege for use"; (2) must not be "excessive in comparison with the governmental benefit conferred"; and (3) must not be "discriminatory." *Id.* at 716-17. It was in fact to achieve these same goals that Congress regulated airport fees even more strictly through the AHTA.²¹

For all these reasons, therefore, the *Evansville* standard should serve as the baseline against which to measure the "reasonableness" of fees under § 1513(b). And as explained below, when construed in light of Congress'

¹⁹ See *American Trucking Ass'ns v. Scheiner*, 483 U.S. 266, 289-90 (1987) (applying *Evansville* standard); *Massachusetts v. United States*, 435 U.S. 444, 466-67 (1978) (extending *Evansville* standard to evaluate reasonableness of aviation user fees under intergovernmental tax immunity doctrine).

²⁰ See J.A. 25 (applying *Evansville* standard under AHTA); Brief of All Respondents in Opposition to Petition for Writ of Certiorari 26 (AHTA and Commerce Clause standards are "functionally equivalent").

²¹ See 49 U.S.C. App. § 1513(b) (1988) (AHTA prohibits all fees on aircraft operators except reasonable fees "for the use of airport facilities"); Senate Report, 1973 U.S.C.C.A.N. at 1446 (expressing concern that head tax revenues "would be used to gain financial windfalls"); *id.* (stating that *Evansville* "[did] not provide adequate safeguards to prevent undue or discriminatory taxation").

overall intent in enacting the AHTA, the Airport's fees violate *all three* of *Evansville*'s requirements.²²

A. The Airport Unreasonably Overcharges the Airlines for Their Use of Airport Facilities

The first requirement for "reasonable" airport user fees is that they be "based on some fair approximation of use or privilege for use." In other words, they must relate in some way to "the use of facilities for whose benefit they are imposed." *Evansville*, 405 U.S. at 716, 717 (emphasis supplied). See also *Massachusetts v. United States*, 435 U.S. at 467 (user fee must be "a fair approximation of the cost of the benefits civil aircraft receive"). Thus, as Judge Flaum determined in *Indianapolis*, in order to reasonably reflect the differences in the extent of use of airport facilities by different users, "the amount of the fee charged must relate to the benefits supplied to the user, measured according to the costs incurred in supplying the benefits." 733 F.2d at 1276.

But the Airport's cost allocation methodology bears no relation whatsoever to the benefits actually received by the various Airport users. Instead, as noted, the concessions are allocated *none* of the Airport's substantial air-operations costs, even though the evidence of record establishes the common-sense proposition that those concessions are huge beneficiaries of the air-operations. Indeed, the record establishes that the concessions are entirely dependent on the air operations for their customer flow, and *would not even exist at all* were it not for those operations.²³ The record also establishes that

²² Because a fee must meet all three of these requirements to be reasonable, the violation of any one would be sufficient to invalidate the Airport's fees. However, because invalidation of the fees under each of these grounds would have somewhat different consequences for the Airlines and the Airport, the Airlines urge the Court to invalidate the Airport's fees on all three grounds.

²³ See, e.g., Dompke Testimony at 140 (the airport "parking lot wouldn't exist if it were dissociated from the roadways and the

the fees the concessions actually pay are simply economic payment for access to the passenger flow created by the air operations.²⁴ It is patently unreasonable, therefore, for the Airport to assess *all* the costs of those operations on the Airlines and general aviation and none on concessions. As Judge Flaum explained, the Airport's approach "ignores the costs of producing the customer flow" to the concessions, *i.e.*, the costs of the air operations. 733 F.2d at 1276 n.9.²⁵

Thus, rather than allocating costs to the concessions based on some "fair approximation" of the benefits they receive, the Airport instead allocates to them only a small percentage (24%) of the *terminal area* costs, based

landing field") (J.A. 66); *id.* at 167 (parking lot is "[c]ompletely" dependent on airfield and terminal) (J.A. 78); Horngren Testimony at 592 ("[i]f the airlines weren't there, there would be no concessionaires there") (J.A. 108). The reverse is not true, however, as the Airlines would obviously continue to operate even absent the concessions.

²⁴ See Dompke Testimony at 159 (concessions are "paying for the access to the passengers") (J.A. 74); Deposition of Charles W. Seaman at 119 (rental car companies are paying "for access to the flow of passengers") (J.A. 64) (Mr. Seaman is a former rental car agency executive in charge of airport rental facilities); Levy Testimony at 1019 (J.A. 191); Horngren Testimony at 475 (J.A. 91-92).

²⁵ The Court of Appeals completely mischaracterized the Airlines' argument on this point, stating that the Airlines had asserted that 100% of the terminal building common areas had been charged to them. The Airlines made no such assertion, but rather noted only that the Airlines are charged the vast majority of the common area costs, based on a square-footage formula. See Brief of Appellants at 29 n.46. This allocation is unreasonable, regardless of whether all—or merely most—of the common area costs are borne by the Airlines, as it ignores the substantial benefit the concessions derive from the passenger flow through the common areas. And more importantly, irrespective of whether it is reasonable for the Airport to allocate terminal costs based on relative floor space occupancy, the Court of Appeals completely ignored the Airlines' main point, which is that the Airport allocates the concessions *none* of the substantial costs of the air operations.

entirely on the relative amount of square footage they occupy in the terminal.²⁶ Then, having allocated costs based only on a few square feet of terminal-area space, the Airport thereafter ignores that allocation in the *actual fees* it charges the concessions. It instead charges the concessions actual fees vastly in excess of their respective theoretical allocations, generating revenues that necessarily could not be produced solely by the limited costs related to the square footage the concessions actually occupy. For example, the rental car agencies pay fees that are more than 24 times the costs that the Airport allocates to them (*see supra* at 6), demonstrating again that the fees they are actually charged are in fact payment for access to the passenger flow.²⁷

Plainly, the Airport intended through this approach to unfairly shift virtually all of its air-operations costs to the Airlines and charge them accordingly, and then, because this misallocation necessarily understated the costs fairly attributable to the concessions, the Airport simply ignored the resulting allocation to the concessions and charged them instead a much higher fee to pay for their access to the passenger flow. The necessary result of this scheme is not only to vastly overcharge the Airlines for their fair share of air-operations costs—because none of those costs are allocated to the concessions—but also to recover those air-operations costs *again* from the Air-

²⁶ The parking lot is treated by the Airport as a stand-alone cost center; but, like the terminal concessions, the parking lot is allocated none of the air-operations costs.

²⁷ The unreasonableness of the Airport's square-footage allocations is further demonstrated by the fact that the advertising and telephone concessions (which utilize only wall space) generate substantial revenues—derived solely from the passenger flow—but occupy no square footage at all. See Dompke Testimony at 159-61 (J.A. 74-75). The Airport thus allocates no costs to these concessions, but instead deducts a portion of the advertising revenues from the terminal costs it allocates to other users. See Pl. Ex. 6 at 6 (J.A. 203-04). The Airport, however, refuses to similarly deduct the substantial excess revenues received from the other concessions.

lines' passengers, who ultimately pay the concession fees. It is little wonder that this approach has created surpluses that "troubled" the District Court and that were criticized by a Judge on the Court of Appeals as a "slush fund."²⁸

This Court has held that "considerations of fairness, not mere mathematics, govern the allocation of costs." *Colorado Interstate Gas Co. v. Federal Power Comm'n*, 324 U.S. 581, 591 (1945). In that case, two gas companies had objected that the Federal Power Commission, when allocating the costs of a pipeline between the companies' regulated and unregulated activities in order to determine a reasonable regulated rate, had not segregated sections of the pipeline but had treated it as an integrated whole. The Court held that the allocation was fair because "the beneficiaries of the entire project share equitably in the cost." *Id.* As the Court held, to allocate the regulated activities all the costs of the pipeline section servicing those activities would improperly assume that this section "was a separate project on which the [unregulated activities] were in no way dependent." *Id.*

That is, however, precisely what the Airport has done in its allocation of air-operations costs. The Airlines submit that it is plainly unfair, and unreasonable, for the Airport to employ an arbitrary allocation methodology that completely ignores the substantial benefits bestowed on the concessions by the air operations, as well as the dependence of the concessions on those operations. Since the Airlines have therefore paid substantially more than their fair share of the costs of those operations, their fees are unreasonable under the AHTA.

²⁸ Official Audio Tape of Oral Argument before the United States Court of Appeals for the Sixth Circuit, Nos. 90-1811/2117 (Sep. 23, 1991).

B. The Airport Unreasonably Imposes Fees that Are Designed to Generate Substantial Excess Revenues at the Expense of the Airlines and Their Passengers

In addition to, and independent of, the Airport's arbitrary and unfair allocation of costs among various users, the Airport's fee methodology is unreasonable because it is designed to earn, and in fact does earn, substantial surpluses for the Airport far in excess of its costs. These surpluses, which are generated at the expense of the Airlines and their passengers, flatly contravene Congress' intent that airports impose only those fees necessary to make them self-sustaining without generating "financial windfalls." Senate Report, 1973 U.S.C.C.A.N. at 1446. They also contravene *Evansville's* requirement that airport user fees do no more than "meet . . . past, as well as current, deficits." 707 U.S. at 720.²⁹

1. The Airport Unreasonably Generates Revenues Far in Excess of Its Costs

There is no dispute that the Airport's fees generate surplus revenues far in excess of all the Airport's costs of operations, maintenance, debt service, and other capital expenditures, including every conceivable future capital project. Indeed, as noted, as of the end of 1989 the Airport's accumulated cash surpluses had risen to more than \$9,000,000, which equaled more than 127% of that year's total revenues. And, as the Airlines established at trial, these surpluses will rise to at least

²⁹ User fees such as those at issue in *Evansville* and this case are subjected to a far stricter standard under the Commerce Clause than are general revenue taxes. See *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 621-22 (1981). Unlike general revenue taxes, which need not be related to the services provided to the taxpayer, user fees are invalid if they are "manifestly disproportionate to the services rendered" by the State to the users. *Id.* at 622 n.12 (quoting *Clark v. Paul Gray, Inc.*, 306 U.S. 583, 599 (1939)). In enacting the AHTA, Congress made clear both that airport user fees were not to be used for general revenue purposes and that their validity was to be measured under an even stricter standard than this Court applied under the Commerce Clause in *Evansville*.

\$19,000,000 by the end of this decade, even accounting for every projected capital project on the Airport's "wish list," the vast majority of which had not received required approvals. *See supra* at 8.³⁰ Given these facts, it is not surprising that the Airport's witnesses could give no use for these surpluses other than as a hypothetical earthquake contingency fund. *Id.* at 9. It is also not surprising that a panel member in the Sixth Circuit would regard them as a "slush fund."

It is unreasonable for the Airport to assess fees on the Airlines and their passengers that produce such unnecessary, exorbitant profits. In enacting the AHTA, Congress sought to prohibit airports from collecting fees that "would be used to gain financial windfalls." Senate Report, 1973 U.S.C.C.A.N. at 1446. Yet that is precisely what the Airport's fees have produced in this case. As Judge Posner held in *Indianapolis*, such fees are necessarily unreasonable under the AHTA because the "result is an exaction that is wholly disproportionate to the costs to the airport of serving the airlines and their passengers." 733 F.2d at 1268.³¹

Furthermore, in *Evansville* this Court held that user fees are "excessive in relation to costs incurred by the taxing authorities," and are therefore unreasonable, if they "do more than meet . . . past, as well as current, deficits." 707 U.S. at 719, 720.³² Here, the Airport's surpluses are

³⁰ As explained below, the Airlines also believe it is inappropriate to charge current users for future projects. *See infra* at 36.

³¹ *See also* Note, *Airline Deregulation and Airport Regulation*, 93 YALE L.J. 319, 323-24 (1983) ("the overall purpose of [the AHTA] was to prevent revenues from airport user fees from exceeding airport operational and capital costs").

³² As the Court has subsequently explained, this standard "compar[es] total revenue with total outlays," and allows current revenues to be offset against past deficits. *Massachusetts v. United States*, 435 U.S. at 470 n.25.

not used to meet any "past" or "current" deficits, but rather accumulate for no purpose whatsoever. This is flatly at odds with Congress' intent that local airports charge only reasonable user fees which, when combined with generous federal funding derived from the 10% tax on passenger airline tickets, "will make the airport as self-sustaining as possible . . ." 49 U.S.C. App. § 2210(a)(9) (1988).³³

In creating a limited exemption in § 1513(b) for "reasonable" user fees on aircraft operators, Congress intended for those fees merely to compensate for airport costs, not fund unlimited airport profits.³⁴ Congress also sought to prevent what occurred in the aftermath of the *Evansville* decision, when local airports throughout the Nation immediately began imposing their own head taxes without limitation or regard for reasonableness, thereby multiplying the burdens on interstate commerce.³⁵

³³ The Court expressly relied on this language in upholding the fees at issue in *Evansville*. 405 U.S. at 721. (The language was originally enacted in 1970 as Section 18(8) of the AADA, and was reenacted in 1982 as Section 511(a)(9) of the AAIA). Just as this Court relied on this language in *Evansville*, so should the Court rely upon it in interpreting the AHTA. The AHTA's prohibition on local airport fees was intimately connected with federal funding requirements, and Congress intended that "the two actions must be viewed together and that neither should stand alone without the other." Senate Report, 1973 U.S.C.C.A.N. at 1455. *See also* *Island Aviation, Inc. v. Guam Airport Authority*, 562 F. Supp. 951, 959 (D. Guam 1982) (reading § 1513 and § 2210 together); Brief for the United States as Amicus Curiae 14 (filed May 18, 1993) (same); Brief of All Respondents in Opposition to Petition for Writ of Certiorari 18 (Section 2210 "must be considered in applying AHTA").

³⁴ *See, e.g.*, Hearings on H.R. 2337 *et al.* before the Subcomm. on Trans. and Aero. of the House Comm. on Interstate and Foreign Commerce [hereinafter "1972 House Hearings"], 92d Cong., 2d Sess. 99 (1972) (statement of Rep. Dingell) (AHTA was intended to permit "fair and compensatory landing charges").

³⁵ As Congress stressed, whereas only five or six jurisdictions imposed head taxes prior to *Evansville*, that number had increased

The same outcome will occur, however, if the decision of the Court of Appeals were upheld in this case. For if every airport in the country were permitted to accumulate profits on the scale that Grand Rapids has, the result would be to completely sabotage Congress' intention to limit further burdens on air travel.³⁶

2. All of the Airport's Costs and Revenues Must be Considered When Evaluating the Reasonableness of the Fees Imposed on the Airlines

The Court of Appeals held that the Airport's substantial profits are irrelevant to whether the fees imposed upon the Airlines are reasonable, because "[n]on-airline concessions are not within the scope of the AHTA." J.A. 23.

This holding misconstrued the Airlines' challenge, as well as Congress' intent in enacting the AHTA. The Airlines are not challenging the reasonableness of the concession fees under the AHTA.³⁷ Rather, the Airlines

to 44 only one year after this Court's decision. See H.R. Rep. No. 157, 93d Cong., 1st Sess. 4 (1973) (number as of April 19, 1973); Hearings on H.R. 4082 *et al.* before the Subcomm. on Trans. and Aero. of the House Comm. on Interstate and Foreign Commerce, 93d Cong., 1st Sess. 64 (1973) (statement of Rep. Dingell) ("the number is going up by the minute"); see also Senate Report, 1973 U.S.C.C.A.N. at 1450 (noting that 31 jurisdictions had enacted head taxes as of February 30, 1973).

³⁶ Such an outcome would be especially inappropriate in light of Congress' recent passage of PFC legislation that authorizes airports to charge what amount to "head taxes" to fund specific capital projects approved by the FAA. See *supra* at 15. Indeed, the Airport has availed itself of this authority and has applied for and received approval to impose a PFC in order to raise \$12,450,000 for planned capital improvements, some of which were relied on at trial to justify the surpluses here at issue. This makes those surpluses even less "reasonable" within the meaning of the AHTA.

³⁷ Although it is not necessary to reach the issue in this case, the AHTA's broad language plainly applies to concession fees as well as to fees on aircraft operators. Under § 1513(a), no public airport may "levy or collect a tax, fee, head charge, or other charge, directly

are challenging the reasonableness of the Airport's fee methodology as it affects *them*, and argue only that the effect of concession fees must be *considered* when deciding that question. As Judge Posner held in *Indianapolis*:

The reasonableness of the concession rentals themselves is not in issue in this case—only the reasonableness of the fees charged the airlines. The basis of the airlines' complaint about those fees, however, is that the airport is required to and has failed to take its concession rentals into account in determining what fees to impose on the airlines.

733 F.2d at 1265.

Moreover, in the AHTA Congress specifically prohibited public airport operators from imposing any fees "*directly or indirectly*" on persons traveling in air commerce or on the carriage of those persons. The history of the statute makes the intent of this language clear: "[w]hether the passenger pays the head tax, or whether it is absorbed by the airlines, *the end result is to raise the cost of air travel.*" Senate Report, 1973 U.S.C.C.A.N. at 1451 (emphasis supplied). Furthermore, in 49 U.S.C. App. § 2210(a)(1) (which must be read together with the AHTA, see *supra* note 33), Congress required that all airport facilities "be available for public use on fair and reasonable terms" As the Solicitor General has pointed out in this case, this statutory provision plainly includes concessions. See Brief for the United States as Amicus Curiae 8 (filed May 18, 1993).

In addition, and in any event, the Airlines established at trial that the Airport's concession fees are ultimately

or indirectly, on persons traveling in air commerce" 49 U.S.C. App. § 1513(a) (1988). Under this language, a concession fee is clearly an "indirect" charge on "persons traveling in air commerce." Of course, fees on concessions must be subject to an inherent reasonableness requirement, a requirement that Congress made explicit in § 1513(b) with respect to fees on aircraft operators,

paid by the Airlines' passengers—because those passengers *are* the concessions' customers. Therefore, as Judge Posner held, when the fees on concessions are considered together with the fees on the Airlines, the Airlines are necessarily adversely affected. This is because, as an economic matter:

When the airport charges a rental fee to concessionaires it is as if it were charging a landing fee to the airlines or imposing a head tax on the passengers. If a traveler is willing to pay \$140 to fly from Indianapolis to (say) New York, it should be a matter of indifference to him whether he pays \$100 for the ticket, \$10 in head tax, and \$30 for parking; or \$120 for the ticket and \$20 for parking, with no head tax. What matters to him is the total cost that he must incur to make the flight, rather than the form in which the cost is distributed among the various items he must buy.

733 F.2d at 1268.

Indeed, as noted above, Congress itself expressly embraced this same proposition, *i.e.*, that it is the *total* cost of travel that matters to the passenger and that determines the impact on air commerce.³⁸ Accordingly, any increase in that total cost—either through increased concession fees on passengers, increased Airline fees, or a combination of both—will necessarily lead to a decline in air travel and a corresponding decline in Airline revenues. Therefore, when the Airport's total fees on the Airlines and their passengers dramatically exceed the Airport's costs—as they plainly do here—“the end result is to raise the cost of air travel” (Senate Report, 1973 U.S.C.C.A.N. at 1451), an end result that necessarily harms both the Airlines and interstate travel. Conversely, requiring the

³⁸ Cf. *Morales v. Trans World Airlines, Inc.*, 112 S. Ct. 2031, 2039-40 (1992) (local aviation regulation must be measured by its actual economic effects on airline ticket prices, regardless of whether that regulation directly regulates those prices).

Airport to impose only reasonable fees that do no more than meet its past and current deficits will necessarily reduce the exaction on the Airlines—the result Congress intended when it enacted the AHTA.³⁹

For all these reasons, the effect of the Airport's concession fees simply cannot be ignored when evaluating the reasonableness of its fees on the Airlines. For to do so would permit all airports to do what this one has done: impose fees that generate “financial windfalls,” that unreasonably raise the total costs of air travel, and that unfairly burden Airlines and their passengers.⁴⁰ That

³⁹ Thus, it is unnecessary to decide, as did the Court of Appeals, whether the Airlines have “standing to assert the claims of the non-airline airport users or passengers.” J.A. 22. The Airlines are here asserting their *own* rights to be free of unreasonable fees, not the rights of other users. Nevertheless, the Court of Appeals erred in holding that the Airlines had no standing to raise the rights of their passengers. See, e.g., *Craig v. Boren*, 429 U.S. 190, 194 (1976) (business has standing to raise rights of customers because of effect that violation of those rights has on revenues); *Interface Group, Inc. v. Massachusetts Port Auth.*, 816 F.2d 9, 16 (1st Cir. 1987) (Congress “viewed air carriers as a kind of surrogate for air passengers” under the AHTA because they have “a significant financial incentive, and the expertise needed, to enforce the statute”).

⁴⁰ Citing language from Judge Posner's opinion in *Indianapolis*, the courts below considered whether the Airport exercised “monopoly” power. See J.A. 24; Pet. App. 33a-34a. This consideration, however, is irrelevant under the AHTA, just as it was under this Court's analysis in *Evansville*. In the AHTA, Congress prohibited unreasonable fees at *all* airports, not merely those that possess a particular degree of monopoly power. Thus, the critical question is whether the Airport assesses fees far in excess of its costs—an entirely straightforward analysis—not whether it is a “monopoly” under some unknown definition of that term. Nor did Judge Posner reason any differently, as he referred to monopoly power merely as an explanation of the airport's ability to assess fees in excess of its costs (an ability clearly present in this case), not as a prerequisite to a finding of unreasonableness under the AHTA. See 733 F.2d at 1267 (“[i]f the Indianapolis airport did not have monopoly power it could not extract revenues vastly in excess of its costs”); *id.* at 1269 (airport's surpluses show its locational monopoly). In

is precisely what Congress sought to prohibit when it enacted the AHTA.

3. *The Airport Unreasonably Assesses Mythical "Carrying Charges" on Capital Assets that Require Airport Users to Pay Two to Three Times the Cost of Those Assets*

It is also patently unreasonable under the AHTA to require airport users to pay the airport two to three times the cost of its capital assets, with the excess being added to the airport's cash surplus. Yet that is what the Airport has done here, through the imposition of mythical "carrying charges" on locally-funded capital assets.

The Airport assesses such charges on the locally-funded portion of all capital assets,⁴¹ whether purchased from bond revenues or from previous surpluses. See Ross Deposition at 88 (J.A. 50-51). It does so by assuming—contrary to fact—that all locally-funded assets were purchased with non-existent 25-30 year mortgages and by charging a hypothetical 8% "interest" rate on those assets plus a ½% "periodic maintenance" charge. See Pl. Ex. 6, Exs. 5 & 7 thereto (J.A. 212-13, 216-19); Dompke Testimony at 141-47 (J.A. 67-70).

Thus, whereas charging only for depreciation plus debt service interest would recover no more than the actual cost of the assets over their useful lives, the Airport's carrying charges result in the Airlines and other users paying approximately twice the cost of those assets, and

any event, as noted, the record in this case demonstrates that in fact the Airport at Grand Rapids *does* have monopoly power. See Horngren Testimony at 551, 557 (J.A. 104).

⁴¹ Under federal law, it is improper for the Airport to include the federal share of any project financed by federal funds in the rate base from which it calculates its user fees. See 49 U.S.C. App. § 2210(a) (9) (1988). The Airport also deducts the share of projects financed by State grant money.

three times when one considers that the Airport users in fact funded the surpluses from which many of the assets were originally purchased.⁴² For example, a recent addition to the terminal building cost the Airport \$3,174,000, but Airport users are being allocated carrying charges of \$311,640 per year for nearly thirty years, which will result in a total airport "recovery" of approximately \$9,000,000.⁴³

Such charges are inherently unreasonable and necessarily overstate fees properly assessable on the Airlines. Under the AHTA, the Airport may charge reasonable user fees designed to recover its costs, but it may not charge fees that recover two to three times those costs, thereby generating prohibited financial windfalls. The Airport has defended its carrying charges as being similar to "interest charged by a financing institution."⁴⁴ Congress, however, did not intend for public airports to become "financing institutions" that earn a profit on funds expended on their own facilities.

⁴² The maintenance charge allows double recovery for the Airport as well, as users are also allocated the current maintenance costs of all Airport facilities. See Pl. Ex. 6, Ex. 3 thereto (J.A. 209).

⁴³ See Pl. Ex. 6, Ex. 7 thereto, at 2, line F, col. 5 (original cost); *id.* at col. 13 (annual carrying charge); *id.* at col. 6 (useful life) (J.A. 216-17); Horngren Testimony at 476-79 (J.A. 92-94).

⁴⁴ Appellee Airport's Brief 15. See also J.A. 29 (Court of Appeals' finding); Brown Testimony at 887-88 (carrying charge is "[d]epreciation with an interest cost" that is intended to "equal . . . what [the Airport] might have earned on the money had [it] invested it in some other particular area") (J.A. 140); Ross Deposition at 240 (carrying charge is justified because "the county could keep those funds and get [an] interest return on them if we didn't use it for further development of the airfield") (J.A. 55); Deposition Testimony of Sandra Doncal ("Doncal Deposition") at 105-06 (carrying charge equal to what Airport could have earned if it had not invested in airport facilities but had put the money in a bank instead) (J.A. 56) (Ms. Doncal was the Director of Finance for the Kent County Aeronautics Board from 1984-89).

The Airport has also defended these charges as a mechanism by which the Airport is able to "accumulate funds rather than borrow to finance needs." Appellee Brief of the County of Kent, Michigan 27-28. This *post hoc* rationalization⁴⁵ likewise cannot be squared with the AHTA. The AHTA permits the Airport to assess only reasonable fees on aircraft operators "*for the use of airport facilities.*" 49 U.S.C. App. § 1513(b) (1988) (emphasis supplied). Under this language, an airport may not "accumulate funds" by charging current users for speculative future capital costs that have not been incurred and that may never be incurred. Such fees "are unreasonable as a matter of law because they do not relate to the present use of the existing public facility." *City and County of Denver v. Continental Air Lines, Inc.*, 712 F. Supp. 834, 840 (D. Colo. 1989).⁴⁶

⁴⁵ The Airport's carrying charges bear no relation whatsoever to any planned capital expenses. If the Airport wished to accumulate funds for the replacement of capital assets upon the expiration of their useful lives, it would charge for depreciation plus an amount designed to approximate the effect of inflation. The Airport's carrying charges, however, approximate market interest rates (see Doncal Deposition at 105-06 (J.A. 56)), which are unrelated to (and necessarily higher than) inflation rates. Moreover, the Airport has made no showing regarding which of its assets it intends to replace.

⁴⁶ In *Denver*, the Court held that an airport may not charge current users for the costs of a future new airport, explaining that "since the airlines are unable to use airport facilities which do not yet exist, [the airport] cannot charge them and their passengers for any costs connected with a replacement facility before that facility is in use." *Id.* at 840. The Court held that the airport's charges "are the sort of 'financial windfalls' contemplated by Congress since there is no assurance that the proposed new airport will be built or that the defendant airlines will ever actually use the new airport." *Id.*

Similarly, in *Raleigh-Durham Airport Authority v. Delta Air Lines, Inc.*, 429 F. Supp. 1069 (D.N.C. 1976), the Court struck down charges for depreciation, interest, bond debt, and periodic maintenance on airport improvements not then in use. As the Court held,

C. The Airport Unreasonably Discriminates Against the Airlines in Favor of Local Aviation

Finally, the Airport's fees violate the third *Evansville* standard: they discriminate against the Airlines in favor of local general aviation. As noted, the Airlines are charged 100% of their allocated costs as determined by the Airport, but locally-based general aviation is charged less than 20% of its allocated costs. As was held in *Indianapolis*, "[t]his is just the sort of discrimination Congress wanted to prevent in the Anti-Head-Tax Act." 733 F.2d at 1271. This was also the conclusion of Judge Kennedy, who dissented from the panel's decision below. *See J.A. 27.*

Congress enacted the AHTA in part because it believed the *Evansville* decision "[did] not provide adequate safeguards to prevent . . . discriminatory taxation." Senate Report, 1973 U.S.C.C.A.N. at 1446. In particular, Congress was concerned that head taxes, which typically exempted general aviation, unduly discriminated against commercial airline passengers in favor of owners of private aircraft.⁴⁷ The Airport's discriminatory fee structure, which is not justified by any differences in the use of Airport facilities by the Airlines and general aviation,

"[t]he concept of . . . prepaying or prefunding such improvements by increased landing fees prior to their construction . . . has no proper place in calculation of landing fees" *Id.* at 1081.

⁴⁷ *See, e.g.*, 1972 House Hearings at 99 (statement of Rep. Dingell) (shift from compensatory landing fees to head taxes would improperly "shift the burden from general aviation to the airline user"); *id.* at 114 (statement of Rep. Dingell) (with head taxes, "the fellow using the airline will pay more than the fellow flying in his private jet"); Hearings on S. 2397 *et al.* before the Subcomm. on Aviation of the Senate Comm. on Commerce, 92d Cong., 2d Sess. 188 (1972) (statement of Sen. Cannon) ("I am sure you can see the inequity if you are going to put [the tax] on passengers who travel simply on scheduled air carriers as distinguished from general aviation users who have separate airport facilities").

is precisely the type of discriminatory burden on commercial air passengers that Congress sought to prohibit.

The Court of Appeals nevertheless held that this fee structure "does not result in discriminatory treatment against the Airlines, because the shortfall from General Aviation is not paid for by the Airlines but is made up out of the surplus concession revenues." J.A. 34 (opinion of Contie & Nelson, JJ.). This holding is erroneous both as a matter of fact and as a matter of law.

First, it is simply not true that the discriminatory treatment has no effect on the Airlines. As Judge Kennedy noted in dissent below, the concession revenues that are currently subsidizing the discriminatory fees on general aviation "could be used to purchase improvements or additional equipment that would potentially benefit both the concessions and the Airlines." J.A. 27. Thus, because these funds are used instead to subsidize general aviation, the Airlines are directly harmed. And because the concession fees are in fact funded by the airline passengers, the subsidy is ultimately felt by the Airlines in decreased ticket revenues. Finally, to the extent that general aviation and the Airlines are alternative, competing modes of travel, the systematic discrimination against the Airlines necessarily puts them at a competitive disadvantage. See *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 267 (1984).

Even more importantly, under this Court's Commerce Clause precedents (which, as explained above, must be considered a minimum standard under the AHTA), there is no justification for the Airport's blatant discrimination in favor of local interests.⁴⁸ As this Court has repeatedly

⁴⁸ For purposes of the AHTA (in contrast with the Commerce Clause) it is irrelevant that general aviation is locally-based as compared to the national Airlines, because Congress intended to forbid undue discrimination among *all* airport users, and, specifically, discrimination in favor of general aviation.

held, such facially discriminatory legislation "is typically struck down without further inquiry" and "at a minimum . . . invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives." ⁴⁹ The AHTA demands at least this scrutiny, if not more.

The Airport has offered no reason, much less a legitimate one, for its discriminatory treatment of general aviation, arguing instead that the discrimination is lawful because the Airport is merely subsidizing general aviation rather than taxing the Airlines. This Court, however, has already rejected that argument. In *Bacchus Imports, supra*, the Court rejected a State's claim that discriminatory tax exemptions for local products were appropriate because the exemptions merely sought to promote local industry rather than discriminate against foreign products. 468 U.S. at 273. As the Court held:

If we were to accept that justification, we would have little occasion ever to find a statute unconstitutionally discriminatory. Virtually every discriminatory statute allocates benefits or burdens unequally; each can be viewed as conferring a benefit on one party and a detriment on the other, in either an absolute or relative sense. The determination of constitutionality does not depend upon whether one focuses on the benefited or the burdened party. A discrimination claim, by its nature, requires a comparison of the two classifications, and it could always be said that there was no intent to impose a burden on one party, but rather the intent was to confer a benefit on the other.

Id.

⁴⁹ *Chemical Waste Management, Inc. v. Hunt*, 112 S. Ct. 2009, 2014 (1992) (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979)). Accord, *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources*, 112 S. Ct. 2019, 2023-24 (1992); *Wyoming v. Oklahoma*, 112 S. Ct. 789, 800-02 (1992).

For all these reasons—the fees' unfair allocation of costs to the Airlines, their exaction of revenues from the Airlines and their passengers far in excess of the Airport's costs, and their deliberate discriminatory treatment of the Airlines—the fees are unreasonable under the AHTA and should be disapproved by this Court.

II. THE AIRPORT'S FEES VIOLATE THE COMMERCE CLAUSE

The Commerce Clause provides that “[t]he Congress shall have Power . . . to regulate Commerce . . . among the several States,” and has long been understood to embody a negative prohibition against State action that unreasonably burdens interstate commerce. However, notwithstanding that this Court decided an airline Commerce Claim challenge in *Evansville*, the Court of Appeals refused even to *consider* such a claim here, holding that the Commerce Clause remains operative only if “Congress ha[s] taken no other action to regulate the area.” J.A. 31 (citing *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982)). According to the Court of Appeals, because Congress has acted to regulate airport fees through the AHTA, courts may no longer review such fees under the Commerce Clause.

This holding is erroneous. As this Court has held, courts must undertake such review unless “Congress’ ‘intent and policy’ to sustain state legislation from attack under the Commerce Clause” was “*expressly stated*” in the legislation at issue. *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 960 (1982) (quoting *New England Power Co. v. New Hampshire*, 455 U.S. 331, 343 (1982)) (emphasis supplied). Furthermore, in that express statement Congress must “*affirmatively contemplate otherwise invalid state legislation*” and its “*intent must be unmistakably clear*.” *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 91-92 (1984) (emphasis supplied). *Accord, Wyoming v. Oklahoma*, 112 S. Ct.

789, 802 (1992) (“Congress must manifest its unambiguous intent”); *Maine v. Taylor*, 477 U.S. 131, 139 (1986) (“An unambiguous indication of congressional intent is required before a federal statute will be read to authorize otherwise invalid state legislation . . .”).⁵⁰

As this Court has explained, the requirement that Congress must “expressly state” its “unmistakably clear” intent to preclude Commerce Clause review is necessary “because of the important role the Commerce Clause plays in protecting the free flow of interstate trade” *Id.* at 138-39. And, in practice, Congress has regulated almost *every* area of interstate commerce in some way, but only rarely does it expressly state its intention to approve actions that would otherwise contravene the Commerce Clause. Thus, in each of the cited cases, the Court reviewed State action under the Commerce Clause notwithstanding that Congress had taken some “action” to regulate the “area,” because Congress had not expressly manifested its unmistakable, unambiguous intent to preclude such review.

Congress expressed no such intent in the AHTA. Quite to the contrary, far from acting to expressly *approve* local airport charges that would otherwise contravene the Constitution, Congress sought to overrule *Evansville* in part and establish a *stricter* standard than this Court had applied under the Commerce Clause. Thus, to the extent that Congress decided not to subject certain State action to the AHTA’s stricter standards, that action must be subjected to review under the Commerce Clause. Indeed, the language of § 1513(b) expresses Congress’ intent to exempt only a specific and a

⁵⁰ Nothing in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), which was cited by the Court of Appeals, provides otherwise. That case merely recognized that “[w]hen Congress has struck the balance it deems appropriate, the courts are no longer needed to prevent States from burdening commerce” *Id.* at 154. However, nothing in this statement alters the principle that if Congress means to “strike the balance” by precluding Commerce Clause review, it must say so expressly and unmistakably.

limited number of State actions from the AHTA's prohibition, but makes clear that the AHTA was intended to have no effect on the legality of any exempted actions.⁵¹ As a result, in *Wardair Canada, Inc. v. Florida Department of Revenue*, 477 U.S. 1, 7-12 (1986), this Court reviewed an aviation tax under the Commerce Clause notwithstanding the Court's express holding that the tax was not within the scope of the AHTA. The Court of Appeals' refusal to evaluate the Airport's fees under the Commerce Clause was therefore a critical error, and one that—if upheld—would have severe ramifications far beyond the context of the AHTA.

If this Court agrees with the Airlines that the Airport's fees are unreasonable under the AHTA, the Court need not reach the Commerce Clause issue. But if the Court agrees with the Court of Appeals that the Airlines' AHTA challenge (or any portion of it) fails because the effect of concession fees may not be considered under that statute, it becomes imperative to review the Airport's fees under the Commerce Clause.⁵² That is because even if Congress intended to completely exclude the effect of concession fees from consideration under the AHTA, such fees clearly affect interstate commerce and therefore must be considered under the Commerce Clause.⁵³

⁵¹ As this Court has consistently held, saving clauses like § 1513(b) merely limit the scope of federal preemption and do not thereby evince an intent to approve otherwise invalid legislation. See *Wyoming*, 112 S. Ct. at 802 (preemption saving clauses merely preserve constitutionally valid state laws); *New England Power*, 455 U.S. at 341 (same). See also *Aloha Airlines, Inc. v. Director of Taxation*, 464 U.S. 7, 12 n.6 (1983) (intent of § 1513(b) is to limit preemptive scope of AHTA).

⁵² As explained above, the Airport's fees are unreasonable under the AHTA irrespective of the effect of the concession fees. In particular, the Airport's concession fees have nothing to do with its initial misallocation of costs, its unreasonable carrying charges, or its discrimination in favor of general aviation.

⁵³ See, e.g., *McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 241 (1980) (Commerce Clause embraces all activities

When the Airport's fee methodology is measured against the three *Evansville* Commerce Clause standards, it fails to pass constitutional muster for precisely the reasons explained above with respect to the AHTA: it unfairly and arbitrarily allocates all the air-operations costs to aircraft operators and none to concessions; it generates substantial surpluses (including surpluses generated from concession fees imposed on passengers) far in excess of the Airport's costs; and it discriminates against the interstate airlines in favor of locally-based general aviation.⁵⁴ Thus, even if the Airport's fees are in part outside the scope of the AHTA, taken together they unquestionably constitute an unreasonable burden on interstate commerce and are therefore invalid under the Commerce Clause.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed and the case remanded for consideration of petitioners' damages.

Respectfully submitted,

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having any effect on interstate commerce); *Alamo Rent-A-Car, Inc. v. City of Palm Springs*, 955 F.2d 30 (9th Cir. 1992) (airport concession fees subjected to Commerce Clause review); *Alamo Rent-A-Car, Inc. v. Sarasota-Manatee Airport Authority*, 906 F.2d 516 (11th Cir. 1990), cert. denied, 498 U.S. 1120 (1991) (same).

⁵⁴ As Judge Posner reasoned in *Indianapolis*, "since flights by private planes are more likely to be intrastate than airline flights are, the effect of leaving [the discrimination in favor of general aviation] unchanged has been to shift some of the costs imposed by local users of the airport to its interstate users, who are, along with many of their customers, non-residents of [Michigan]." 733 F.2d at 1271.